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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 198.

GAIUS WHITFIELD, APPELLANT,

vs.

THE UNITED STATES.

[redacted]

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 7, 1874.

Cheney v Dial
5 Hurlstone & Norman
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Affirm -

Chief Justice
to write

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print
Petition	1	1
Traverse and pleas	6	3
Final judgment by the court	7	4
Application for allowance of appeal	8	4
Order allowing same	8	5
Finding of facts and conclusion of law	9	5
Opinion of the court	10	6
Concurring opinion of Judge Milligan	11	7
Dissenting opinion of Judge Loring	11	7
Certificate	14	9

1 *Petition.*

United States Court of Claims.

GAIUS WHITFIELD
vs.
THE UNITED STATES. } No. 3335. Filed July 25, 1868.

To the honorable the judges of the Court of Claims:

The petition of Gaius Whitfield, of the county of Marengo and State of Alabama, respectfully represents—

That your petitioner is now about 64 years of age, is the head of a family, and has resided in the county of Marengo for more than forty years last past, and is by occupation a planter.

In the year 1863 your petitioner was the owner and in possession of one hundred and seventy-seven bales of cotton, raised by himself, and stored in a house on his plantation in said county. This cotton was of middling quality, and averaged in weight fully five hundred pounds to the bale. There being at the time no market for cotton, or money or currency in circulation among us with which to purchase cotton, your petitioner agreed to sell an agent of the so-called Confederate States the cotton aforesaid, and received, on account thereof, bonds of the Confederate States, retaining possession of the cotton. This agreement to sell was not made for the purpose of aiding the Confederate States in its pending struggle with the Government of the United States, but simply because there was no other purchaser of cotton within the reach of your petitioner, and no currency or money with which to purchase except the bonds or treasury notes of the Confederate States.

2 Your petitioner has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. He was opposed to secession and to any separation of the States of the Union, as is well known to all his neighbors and friends.

The one hundred and seventy-seven bales of cotton aforesaid were never applied for by the Confederate States, or any agent thereof, but, on the contrary, remained in the possession of your petitioner until the month of September, in the year 1865; your petitioner in the mean time holding, and now retaining in his possession the identical bonds received on account of said cotton, without having passed off or negotiated the same, or received thereon any payment.

On or about the day of September, 1865, one S. O. Smith, acting as special agent of the Treasury of the United States, without any demand upon your petitioner for the cotton, sent a number of United States soldiers upon the plantation of your petitioner, and seized the one hundred and seventy-seven bales of cotton, and hauled seventy-five bales of the same to the town of Demopolis, where it was placed subject to a military guard. At the time of the seizure of this cotton, the bonds received on account of it, and then and now in possession of petitioner, were entirely valueless. The Confederate States, at this time, and at the time of their extinction, were indebted to your petitioner in treasury notes, in bonds, and in certificates of indebtedness for property impressed in an amount much larger than the value of the cotton; and he was and is advised that, by the laws of this State, he had an equitable lien upon the cotton to secure such indebtedness. He remonstrated with Smith against the manner of the seizure; stated

to him the facts of his case, asked time to have the facts investigated and his case decided, but without avail. He finally appealed to a supervising Treasury agent, named Dillen, who seemed to exercise some control over local agents of the Treasury, and explained to him the facts of his case. Under the advice of this officer, your petitioner was allowed to retain one-third of his one hundred and
3 seventy-seven bales, and the remaining two-thirds were received and shipped by the agents of the Treasury, and the proceeds, as he supposes, have been paid into the Treasury. The final arrangement, by which your petitioner was allowed to retain one-third of his cotton, was made by one Leslie Ellis, a special agent of the Treasury, or in his name. The terms of the arrangement, the forms of the orders in reference to it, and the paper or papers treating the arrangement as a compromise, were dictated entirely by the agents of the Government, and written by them; your petitioner had no mode by which he could successfully oppose any terms dictated; the country was under military rule; the courts were powerless to grant relief; the agents of the Treasury were backed by military officers and soldiers, ready to execute the orders of a cotton agent, and hence your petitioner had to acquiesce in any terms which might be dictated to him.

On or about the day of your petitioner addressed a petition to the President, in which he stated the facts of his case, and asked payment for one hundred and eighteen bales of his cotton, unjustly taken from him by the agents of the Treasury. This petition was presented by the Hon. James Campbell, of Philadelphia, and referred to the Treasury Department.

The Secretary of the Treasury declined to make a decision in the case, and referred it to the Court of Claims.

The one hundred and eighteen bales of cotton weighed sixty thousand pounds, and were worth at the time of the seizure at least twenty-five thousand dollars.

The bonds received by your petitioner on account of it were entirely valueless; the cotton never was delivered to the Confederate States or any agent of it. The evidences of debt which petitioner held against the confederate government, at the time of its extinction, constituted a lien in favor of your petitioner on the cotton in his possession; and petitioner insists he is entitled to said cotton, or the value thereof, as there was no authority in law to treat the cotton as subject to capture after the termination of hostilities.

To ascertain the amount for which the one hundred and
4 eighteen bales were sold, your petitioner asks for the usual order for information.

Your petitioner has never sold or assigned said cotton, or any part thereof, or any interest therein; he has never voluntarily in any way aided, abetted, or encouraged rebellion against the United States; he has treated with kindness and hospitality the families of soldiers, and soldiers themselves, when at or about his premises, and has made presents for the benefit of soldiers' families in indigent circumstances, but not with any view or intention to encourage or support resistance to the Constitution and laws of the United States; he opposed secession, opposed the war, and, if his advice had prevailed, the war would not have occurred.

On account of small gifts and acts of hospitality to soldiers and soldiers' families, not intended to promote or encourage the war, he felt it safest to ask of the President pardon and amnesty, which he received

in the form of a pardon, accepted and took the oath required, all of which will appear by the archives of the Government.

The claim of your petitioner, as sole owner of said cotton, is rested on the general jurisdiction of the court, as well as the special jurisdiction of the act of the 12th of March, 1863.

The amount claimed under that act cannot be stated until the return is made to the order for information herein prayed for.

The cotton at the time of seizure, as already stated, was worth twenty-five thousand dollars, for which amount the claimant is entitled to judgment. If, however, the court should decide that the claimant's remedy is confined to the act aforesaid, then he claims judgment for the amount found due to him under the act aforesaid.

GAIUS WHITFIELD.

P. PHILLIPS,
Atty. for Petitioner.

5 THE STATE OF ALABAMA,
Marengo County:

Before me, Edward A. Taylor, a notary public in and for the county, of Marengo, and State aforesaid, by lawful authority, duly admitted and sworn, dwelling in the town of Demopolis, in said county, this day personally appeared Gaius Whitfield, the above-named petitioner, who is known to me, and who, being first duly sworn according to law, deposes and says that no transfer of his claim against the Government of the United States set forth in the foregoing petition, or agreement to transfer the same, or any part thereof, or any interest therein, has ever been made by him; that the said claim as made by him in said petition is just, and that petitioner is justly entitled to the amount thereof, after allowing all just claims and offsets, and that he believes the facts set forth and stated in said petition are true and correct as stated.

GAIUS WHITFIELD.

Sworn to and subscribed before me on this the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-eight.

In witness whereof I have hereunto set my hand and affixed my seal of office the day and date stated herein.

[L. S.] E. A. TAYLOR,
Notary Public.

6 In the United States Court of Claims. December term, A. D. 1868.

GAIUS WHITFIELD
vs.
THE UNITED STATES. } No. 3335.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein, and, not confessing the same or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of $, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of

the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney-General.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant did not, "within two years after the suppression of the late rebellion, prefer his claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
Assistant Attorney-General.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents, therein set forth, were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

Whereby and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the Government, and for the better defence of the Treasury against unlawful claims," approved July 27, 1868, the claimant is barred of his said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney-General.

Filed July 19, 1869.

7 In the Court of Claims.

GAIUS WHITFIELD *vs.* THE UNITED STATES. } 3335.

At a Court of Claims held at the Capitol, in the city of Washington, the 9th day of February, A. D. 1874, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition be dismissed.

By the court.

8 In the Court of Claims.

GAIUS WHITFIELD *vs.* THE UNITED STATES. } 3335.

This day comes into court the said Gaius Whitfield, by his attorney,

P. Phillips, and moves the court for the allowance of an appeal to the Supreme Court of the United States from the judgment of this court in the above-entitled cause.

P. PHILLIPS,
Atty. for Claimant.

Filed February 12, 1874.

Ordered, That the appeal be allowed as prayed for.
By the court.
February 12, 1874.

9 United States Court of Claims.

GAIUS WHITFIELD *vs.* THE UNITED STATES. } No. 3335.

Finding of facts.

In this case the court finds the facts to be as follows:

The claimant was, during the war of the rebellion, a resident of Marengo County, Alabama.

While said war was in progress, he sold to the so-called Confederate States of America 177 bales of cotton, agreeing to accept in payment therefor eight per cent. bonds of said Confederate States, and retaining possession of the cotton subject to future delivery. The price for which the cotton was sold was $15,651.60, which was paid to claimant by a cotton agent of the confederate government, in January, 1865, on a certificate previously given to claimant, the terms of which do not appear. The said payment was made by delivering to claimant bonds, of the description aforesaid, to the amount of $15,500, and paying him $113.72 in confederate money, and charging him with $37.88 interest, which sums together made the aforesaid amount of the price of the cotton. Upon what the charge of interest was made against him does not appear. The said cotton agent, at the time of said payment, made a memorandum on the bonds, showing the mode of the settlement. The claimant kept the bonds aforesaid in his possession, and at the trial of this case produced them in open court.

The said bonds were of the amounts, dates, and times of maturity, as follows: Fifteen, of five hundred dollars each, dated March 3, 1863, and payable to the bearer on the first day of July, 1868; one of five hundred dollars, dated January 15, 1863, payable to bearer on the first day of January, 1880; and five of one thousand dollars each, dated January 15, 1863, payable to bearer on the first day of January, 1871; all with coupons attached for the interest.

The said cotton remained in claimant's possession till about the first of September, 1865, when it was seized by Leslie Ellis, an assistant special agent of the Treasury Department of the United States. Upon the claimant's remonstrating against the seizure, and appealing to the supervising special agent, that officer authorized said Ellis to contract with claimant for the putting of said cotton in good order and the delivery of two-thirds thereof to said Ellis for the United States, the claimant retaining one-third thereof. In pursuance of this authority, the said Ellis, on the 13th of November, 1865, directed the claimant to deliver to the captain of the steamer Huntsman 118 bales of Government cotton,

being so much of the said 177 bales, which was done the next day, when the said Ellis delivered to claimant a receipt therefor in the following terms:

"OFFICE ASSISTANT SUPERVISING SPECIAL AGENT,
"*Demopolis, November* 14, 1865.

"Received of Col. Gauis Whitfield one hundred and eighteen (118) bales Government cotton, being two-thirds (⅔ds) of the amount of his indebtedness to the Government as per contract with Joseph R. Dillin, supervising special agent; and Mr. Whitfield is now released of all obligations for cotton sold to the so-called confederate government.

"LESLIE ELLIS,
"*Assistant Supervising Special Agent, Treasury Department.*"

The said 118 bales of cotton were shipped to New York and sold by Simeon Draper, cotton-agent of the United States, and the net proceeds thereof, amounting to $14,817.26, paid into the United States Treasury.

Upon the foregoing facts the court holds, as a conclusion of law, that the sale of the cotton in question by the claimant to the so-called Confederate States of America, divested the claimant's title thereto, and that he was therefore not the owner of the cotton when it passed into the possession of the agent of the Treasury Department, and is therefore not entitled to recover the proceeds thereof.

The grounds of this conclusion are stated in the following

Opinion.

DRAKE, Ch. J., delivered the opinion of the court:

In his petition the claimant avers that he was the owner of the cotton, the proceeds of which are herein claimed; but at the trial the case was not rested upon the mere ground of ownership. The sale of the cotton by him to the rebel government was not denied; but it was insisted that he has a legal right to reclaim the proceeds thereof, because after the sale, and before the cotton came into the possession of the agents of the United States, the rebel confederacy became insolvent, and therefore the bonds received by him in payment for the cotton were valueless, and he therefore has a right of stoppage in transitu to enforce his lien as a vendor for the unpaid purchase-money.

This is a new application of the doctrine of stoppage in transitu. We have always supposed that that right existed only as to the goods sold, and have not before known it to be claimed to extend to the proceeds of the property after its conversion into money by the vendee or those claiming under him.

The right of stoppage in transitu is, moreover, a right growing out of contract. This court has no jurisdiction of any contract but such as the United States have entered into; but here is an attempt to enforce in this forum a contract alleged to have been entered into between the claimant and the rebel government. Of such contracts this court has no jurisdiction.

The right to enforce a vendor's lien for the purchase-money of personal property sold, rests upon the vendor's not having been paid for the property. If he has been paid for it, there is no lien, and hence no right of stoppage. If the vendor knowingly accepts in payment that which is worthless, or accepts that which is at the time of value, but afterward becomes worthless, he does not, in either case, by the fact of worthlessness, acquire a right to reclaim the property sold.

It seems clear to us that the claimant had sold the cotton in question, and received payment in full for it according to his own agreement with the rebel government. When it was captured, he was holding it "subject to future delivery," that is, subject to delivery whenever called for by that government; and if it had been so called for he could not
11 have withheld delivery. While the property was in this condition, the United States succeeded, by conquest, to all the rights of property of the rebel confederacy, and in virtue of that succession was entitled to seize this cotton and to sell it. And it is clear, from his own acts, that the claimant did not consider himself the owner of it, for he agreed with the United States Treasury agent to put the 177 bales in order, and receive one-third thereof as compensation for his services in that regard.

The petition of the claimant must be dismissed.

MILLIGAN, J., concurring:

The legal question presented in this record is of great delicacy and interest, and, under the English authorities, when viewed purely as an individual and commercial transaction, the decision, as it seems to me, ought to be for the claimants. But as the record presented to us involves, in some degree, the right of the National Government to succeed to the moveable property controlled by the Confederate States for war purposes, at the time of their overthrow, I yield to the opinion just read by the chief-justice, but with hesitation and doubt.

LORING, J., dissenting:

I think this case is within the rule of commercial law shown by the English and American authorities cited by the learned counsel for the petitioner.

And that rule is that, in a sale of specified goods on credit or for negotiable notes, bonds, &c., on time, the insolvency of the buyer before the notes, bonds, &c., are due or negotiated, authorizes the seller, if in possession of the goods, to retain them as security for the price.

This rule transcends the rule of the common law that gives an unpaid vender a lien for the price, because it acts where both the right of property and the right of possession have vested in the buyer; and it differs from the right of stoppage in transitu, because it acts only when the seller has retained the actual possession of the goods, while the right of stoppage in transitu acts only when the seller has parted with the actual possession of the goods.

The rule is referred in the books to the civil law, as are many of the rules of our commercial law, and it arose from the system of sales on credit and for negotiable instruments, which created commerce. And the reason of the rule is, that a sale on credit implies between the parties that the buyer shall keep his credit good for the transaction in reference to which the credit is given; so that the unpaid vender has a stronger equity against the goods still in his hands, than the creditors of the buyer in other transactions.

Of the cases cited in the argument on this point, that most analogous to this is the case of Arnold vs. Delano, 4 Cushing, 33, in which the opinion of the court was read by Chief-Justice Shaw, whose professional practice and whose judicial eminence belonged especially to commercial law.

In that case the defendant, Delano, sold sixty-five cords of wood, which were on his land, and part of a larger quantity, to Sowerby & Grant; the wood was piled, measured, and staked off to show the extent of the sixty cords, and a negotiable note, at six months, was given for the price, and a bill of sale of the wood was given by the seller, re-

ceipted thus: "Received payment by note at six months, at Northampton Bank." And it was agreed that the buyers might remove the wood at their convenience at any time within a year.

Afterward Sowerby & Grant, the buyers, dissolved partnership, and Sowerby assumed the debts, and took, by transfer, the property
12 of the firm; and before the wood was removed or the note was due or negotiated, he became insolvent. His assignee in insolvency brought the suit for the wood, and the seller claimed the right to retain it till the payment or its equivalent.

Chief-Justice Shaw thus states the legal result of the facts and the question raised by them:

"In the present case the wood was marked off and identified, and the vendees had a license for one year to come on the vender's land and to take it away. This was a complete sale, and a constructive delivery, to vest the property in Grant and Sowerby, and on their dissolution and transfer, it vested in Sowerby, and, by the assignment, in his assignee. Then the question is, whether the defendant had, under the circumstances, a lien for the price, and we think he had."

And the chief-justice proceeds to argue on the facts thus: "The vendees did not enter and take the wood; it remained on the vender's land and in his possession in the same manner as before and at the time of the sale. The vender acted in no new capacity; he was to receive nothing for the keeping; he was precisely in the condition of a vender who has not parted with the possession and custody of the goods sold. And this was the state of things when Sowerby went into insolvency, upon which event we think the vender was remitted to his right to keep possession of the wood as a security for the price. Such a vender in possession is regarded as having a higher equity to retain for the price than the assignee of a debtor who has not paid for the property has to claim it for the general creditors."

And the chief-justice states the abstract rule of law thus: "The law, in holding that a vender who has thus given credit for goods waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment the vendee become bankrupt or insolvent, and the vender still retains the custody of the goods or any part of them, * * * then his lien is restored, and he may hold the goods as security for his price."

In the case cited, and in this before us, the material facts were the same. In both the sale was complete and the property vested in the buyer, and the negotiable paper given was secured expressly as payment. In both the property sold was in the possession of the vendor, free of rent and subject to the disposition of the buyer, who could immediately and before the paper given had become due have taken it into his possession, and in both he became insolvent before the paper given in payment became due.

And on the rule of law affirmed in the case cited, I think that the petitioner, on the insolvency of the confederate government, had the right to hold the cotton against them, as security for the price, and that he has the same right as against the United States, claiming as successors of the confederate government.

And I think it immaterial that in arranging the payment by the bonds with the confederate government a small sum was paid in cash to the petitioner. The bonds were on interest, and, when the January coupons were detached, did not make the precise price of the cotton, and the money was paid to make up that price precisely, and this fractional

payment could not of itself entitle the confederate government, after its insolvency, to the delivery of the cotton sold to them.

And I think it immaterial that after the cotton was seized it was agreed between the agent of the Treasury Department and the petitioner that the latter should put the cotton in order for sale. Such arrangement grew out of the circumstances of the case.

13 The cotton had been seized and the petitioner had notified the Department of his claim in July, 1865. In September, 1865, the cotton was not to be returned to him, but was to be sold under the statute, and its net proceeds paid into the Treasury, and the title to those adjudicated here. It was for the interest of both parties that the cotton should be put in order for sale, and under the arrangement made, if the claim of the petitioner was sustained here, he would have put his own cotton in order, at his own cost. If the title was adjudged in the United States, they would have paid the petitioner for the service received from him. The arrangement made, therefore, was a consequence of the petitioner's claim, and not evidence of its abandonment.

14 In the Court of Claims.

GAIUS WHITFIELD *vs.* THE UNITED STATES. } No. 3335.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitor for the claimant for the allowance of an appeal, as filed in the clerk's office, February 12, 1874, and of the order of the court, February 12, 1874, allowing the same; of the finding of facts by the court, and conclusion of law thereon, on which the court founded its judgment; of the opinion of the court; of the concurring opinion of Judge Milligan, and of the dissenting opinion of Judge Loring.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this day of .

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 198. Gaius Whitfield, appellant, vs. The United States. Court of Claims. Filed 7th July, 1874.

REC. 198—2

Supreme Court of the United States.

GAIUS WHITFIELD,
vs.
UNITED STATES. } No. 198.

APPEAL FROM THE COURT OF CLAIMS.

Brief of P. Phillips,

FOR APPELLEE. ant

R. O. POLKINHORN, Printer, Washington, D. C.

Supreme Court of the United States.

GAIUS WHITFIELD,
vs.
UNITED STATES. } No. 198.

APPEAL FROM THE COURT OF CLAIMS.

Brief of P. Phillips,

FOR APPELLANT

The petitioner in this case, as shown by the allegations of the petition, was, at the time of its filing, sixty-four years of age, and for over forty years a planter in Marengo County, Alabama.

In 1865, he was the owner of 177 bales of cotton, then stored in his warehouse.

There being no market for cotton, he agreed to sell to an agent of the Confederate Government the said cotton, and received on account thereof, bonds of the Confederate Government, retaining however the possession of said cotton.

He avers that he had always borne true allegiance to the government of the United States, and that his opposition to secession, and a separation of the States was notorious to all his neighbors.

That during the existence of the Confederacy, this cotton was never applied for, but that it remained in his possession until the month of September, 1865, together with the identical bonds, received on account thereof.

That on the said last mentioned date one S. O. Smith, special Treasury Agent, without making any demand for said cotton, sent a number of United States' soldiers, and seized said cotton.

That his request for delay, that the facts of his case might be investigated by the proper authority, was denied.

That by the advice of another Treasury Agent he was subsequently allowed to retain one-third of the cotton for putting the two-thirds in good order.

That this arrangement was entered into by him at the dictation of the agent backed by a military force, which petitioner had no means to resist.

That the petitioner adressed his petition to the President through the Hon. James Campbell of Philadelphia, asking for a restoration of his property, who referred it to the Secretary of the Treasury, who in turn referred the matter to the Court of Claims.

The petition claims a recovery under the general jurisdiction of the court as well as under the act of 12 March, 1863.

On the trial, which took place in 1874, no evidence was offered by claimant to sustain the allegations of his loyalty, as such evidence under the decisions of the court had become immaterial.

The ownership of the cotton, the seizure by Treasury agents, and the amount of net proceeds in the Treasury, $14,817.26, were established, as also the identity of the bonds received on account of the cotton, which bonds are filed in the cause.

No evidence whatever was offered on behalf of the United States.

Finding of Facts.

That the petitioner sold to the Confederate States 177 bales of cotton, agreeing to accept in payment Confederate bonds, retaining possession of the cotton subject to future delivery, and that these bonds were delivered to him.

That the cotton remained in his possession until about 1 September, 1865, when it was seized by the special agent.

That on his remonstrating against this seizure, and appealing to the supervising special agent, he was allowed to retain one-third of the cotton for putting the two-thirds in good order and delivering the same.

That the two-thirds so delivered were shipped to and sold in New York, and the net proceeds in the Treasury amount to $14,817.26.

That the bonds received by the claimant on account of the cotton was kept by him, and at the trial produced in open court.

Upon these facts the court held, as a conclusion of law, *that the sale by the claimant to the Confederate States, divested his title, and he was therefore not the owner when it was taken by the Treasury agent.*

Assignment of Error.

The appellee ~~ee~~ aut assigns for error the dismissal of his petition, and maintains that on the facts found the judgment should have been in his favor.

There was no legal authority for the seizure by the Treasury agents.

The act of 12 March, 1863, limited their powers to the collection of captured and abandoned property. (12 Stat., 820.)

The act of 2 July, 1864, (——— ,) defined abandoned property as that from which the "lawful owner is voluntary absent, and engaged, either in arms or otherwise, in aiding or encouraging the rebellion."

Captured property was defined by the circular of Secretary Cbase, 3 July, 1863, to be such "as has been seized or taken from hostile possession by the military or naval forces of the United States."

This latter definition is approved by this Court in United States *vs.* Paddleford, 9 Wall., 537.

Notwithstanding this, Secretary McCullough instructed his agents that whenever the descriptive lists captured showed property owned or controlled by the Confederate Government, such property should be taken, "leaving all questions of right, title, or value of consideration to be adjusted by the Court of Claims, to which claimants of said property are referred by the act of Congress."

Again, in another instruction, he directs the collection of all cotton *voluntary subscribed*, as the Department holds that such a subscription is a dedication to the purposes of the rebellion, which forfeits the title of the owner. "The property itself (says he) is offending, and should be taken wherever found."

Acts and Regulations, pamphlet, p. 152, 153.

In his report to Congress, 8 Nov., 1867, he states that he had desired to recall his agencies after the circular of 27 June, 1865, but it being urged that cotton belonging to the Confederate Government was scattered through the States, and it being also urged that property belonging to the Confederate States *should be considered as captured property*, he considered it his duty to collect the same, and therefore continued the agency for this purpose.

Ex. Doc. 97, H. Rep., 39 Cong., 2 Sess., p. 4.

It is very clear there was no legal authority for the seizure in this case, without we may substitute the instructions of the Secretary for the provisions of the act of 1863.

Furthermore, whether a sale of cotton to the Confederate Government is to be regarded as an aid to the rebellion, and so subject it to forfeiture, is a matter with which the Secretary had no concern whatever.

This was not only a proper subject for legislation, but one which, in fact, received the action of Congress in the act 6 August, 1861. (12 Stat. 319.)

To sell or give property to aid the rebellion, by the terms of this act, subjects it to "prize and capture wherever found," and the President is directed to cause it to be "*seized*, *confiscated*, and *condemned*."

With the provisions of this act the Treasury was no more concerned than the Department of the Post Office.

This cotton having been illegally taken from the possession of the owner under the instruction of the Secretary, reserving "all questions of right, title, &c., to the Court of Claims," there should have been a judgment in this court for at least the net proceeds in the Treasury under the general jurisdiction of "implied contracts."

The Secretary undoubtedly supposed he had the power to seize this cotton, and if in this he was in error, *ex equo et bono*, the government is bound to restore at least so much of it as remains in its possession; no proceedings for its seizure, confiscation, or condemnation, having been made as the act requires.

The act of 3 March, 1863, (12 Stat. 820) gives the right to claimants to sue in the Court of Claims and to recover the net proceeds in the Treasury upon proof of ownership, &c.

That the claimant had owned the cotton, and that he was in possession of it at the time of seizure, are facts not denied.

It is however insisted that he had sold the same to the Confederate Government and received its bonds and thus, (notwithstanding his uninterrupted possession) had been divested of all title as owner.

Whether the Confederate Government was capable of becoming a purchaser of property is a question which I do not understand to have been decided by this court.

To every contract there must be parties *competent under the law.* The right to purchase would carry with it the right to sell.

In the case of Sprott v. United States, 20 Wall, 461, the first conclusion of law found by the Court of Claims was:

"That the government of the Confederate States was an unlawful assemblage without corporate power to take, hold, or convey a valid title to property, real or personal."

If this proposition is sustainable then it is evident that the contract of sale made by the complainant with that government did not carry any title out of him.

This court, however, in the case cited leaves this an open question, saying it was not necessary then to decide it.

Assuming, however, that the Confederate government was capable of entering into a contract of purchase recognizable in our courts, the question is then presented, whether property the possession of which was never parted with by the owner, can be taken from him by the United States after the overthrow and dissolution of that

government, by virtue of such a contract of sale, the party in possession being then the holder of the securities given as the consideration of the purchase.

Let us suppose that Whitfield had sold this cotton to A, and had received his bond for the purchase money, but had never parted with the possession. A becomes insolvent but his property had been forfeited to the United States, surely under these circumstances the government asserting its claim through A could never rightfully demand the cotton without paying the purchase money.

Milligan J., who concurred with the chief justice in the adverse decision admits that this case when viewed merely as a transaction between individuals ought to entitle the claimant to a judgment. But he says as "it involves in some degree the right of the National Government to succeed to the movable property controlled by the Confederate States for war purposes, I yield to the opinion just read by the chief justice, *but with hesitation and doubt.*"

We insist that that there is no difference between the case put by us where the contract of sale was made with an individual, and the case before us where the contract, under the same circumstances, was made with the Confederate government.

When a government enters into a contract of purchase or other mercantile operation, it puts off its sovereignty, and in such transactions its rights and obligations are regarded by the Court as standing on no higher grounds than like transactions between individuals.

2 Story Com., § 1330.
U. S. vs. Buford, 3 Pet., 12.
Davis vs. Gray, 16 Wall., 232.

Judge Milligan hangs his doubt on the right of the

government to succeed to the property controlled by the Confederate government for war purposes.

As to this, while conceding to the fullest extent the right of the government to exercise all powers necessary to carry on the war to a successful termination, we maintain that war does not operate *proprio vigore* a confiscation of the enemies' property.

It is for the legislative body to determine the *policy* on which the war shall be conducted.

Congress, during the war, determined the question how far belligerent rights should be exercised.

The act 13th July, 1861, provides for the seizure of ships or vessels belonging to citizens of States engaged in insurrection, found at sea.

By the act 6th August, 1861, property sold or given with intent to use or employ the same for the purpose of promoting the insurrection, is made subject to prize or capture.

By the act 17th July, 1862, the property of persons designated by six enumerated classes is in a certain contingency subject to confiscation.

In neither of these acts is the title of the owner divested by the seizure. This takes place only when judicial proceedings are instituted, and a judgment of condemnation is had. Then the property is sold and the proceeds paid into the treasury.

With neither of these acts had the Treasury Department any concern. As already said, the sole authority is under the act of 1863, which limits its power to captured or abandoned property.

As the government has not chosen to proceed against this cotton under the act of 6th August, 1861, as having been sold for the purpose of promoting the insurrection, in the mode pointed out in the act, it cannot now claim to

hold it on that ground by virtue of the seizure made in this case.

There is, therefore, no foundation for the suggestion on which, alone, Judge Milligan placed his reluctant concurrence in the judgment here rendered.

If this cotton was neither captured nor abandoned, nor has been condemned under any act of Congress directing its confiscation, the Government of the United States can only claim title to it by virtue of its right to succeed to the property owned by the conquered government.

This right must rest alone upon general principles of international law, as Congress has never acted on the theory, that the Confederate Government ever had such an existence as would justify a title by succession.

It was on this theory of succession or representation alone, it was held that the suits broughts in England by the United States against the agents of the confederacy could be maintained.

The Vice-Chancellor after announcing as a clear principle of public law, that any government which *de facto* succeeds to any other, whether by revolution, or restoration, conquest, or reconquest, succeeds to all the public property of the displaced power held, that—"this right, is the right of succession. This right of representation, is a right not paramount, but one derived through the displaced authority, and can only be enforced in the same way, and to the same exent, and subject to the same correlative obligations and rights, as if that authority had not been suppressed, and was itself seeking to enforce it."

U. S. vs. Prioleau, 2 Hem. & Miller, Chan. Cases, 560.

U. S. vs. McRae, 8 L. R. Eq., 75.

If this cotton had been sold to an individual, surely his administrator or his assignee in bankruptcy would have no claim to demand the possession of this cotton, the insolvency of the vendee being an admitted fact. It would then seem to follow, that the government as the successor of this displaced power occupies a like position.

It is proper now to advert the principles which govern the contract of sale.

The Contract of Sale.

It is admitted that when terms of sale are agreed on, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute between the parties, without acutual payment or delivery, and the property, and the risk of accident to the goods, vest in the buyer.

When the sale is for *cash*, the vendee, though he acquires a right of *property* by the contract of sale, does not acquire the right of *possession* until he pays or tenders the price.

When the sale is on a *credit* the vendee in the absence of stipulation is entitled to immediate possession, as the right of possession and the right of property vest at once in him

But this doctrine is subject to the important qualification, that this right of possession is not *absolute* and *will be defeated if the buyer becomes insolvent before he obtains the actual possession.* For though the buyer has the property vested in him, so as to subject him to the risk of any accident, he has not an indefeasible right to the possession, and his insolvency without payment defeats that right, equally after the transitus has begun *as before the seller has parted with the actual possession.*

Bloxam v. Saunders, 6 B. & C., 941.

Says (Shaw, C. J.,) "there is manifestly a marked distinction between those acts, which as between vendor and vendee, go to make a *constructive delivery*, and vest the property in the vendee and that *actual delivery* which puts an end to the right of the vendor to hold the goods as security for the price.

Arnold v. Delano, 4 Cush. 38.

There is a strong leaning in the Courts to enforce this right—"It is a leaning, (says Lord Kenyon) in furtherance of justice." Northey v. Field, 2 Esp., 613.

In another case it is said that the right is based "on the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts."

D'Aquila v. Lambert, 2 Eden., 77.

Again, it is declared that "this right does not depend on the fact, that the vendor having parted with the lien, may get it back if he can stop the goods *in transitu*, but it is described as a right *arising out of his relation to the goods, qua vendor, which is greater than a lien.* Factors are entitled to liens, but they have no right of stoppage."

Kinloch v. Craig, 3 T. R., 119.

It may perhaps be proper to refer to the leading case of Mason v. Lickbarrow, (1 H. Bl., 357) in which this right of the vendor is very fully described by Lord Loughborough, whose decision has been followed in England to this day, and is fully sustained by the American authorities.

"I state it (says he) to be a clear proposition, that the vendor of goods not paid for may retain possession against the vendee, not by aid of any equity, but on grounds of law. Our oldest books consider the payment of the price (day not being given), as a condition precedent and implied in the contract of sale. If day

had been given for the payment, and the vendee could have sustained an action of trover against the vendor, *the price unpaid must be deducted from the damages*, in the same manner as if he had brought an action on the contract for nondelivery. The sale is not executed before delivery; and, in the simplicity of former times a delivery into the actual possession of the vendee was always supposed."

"A destination of the goods by the vendor to the use of the vendee, the marking them or making them up to be delivered, the removing them for the purpose of being delivered, may all entitle the vendee to act as "owner," to assign, or maintain an action against a *third person*, into whose hands they may have come.

But the title of the vendor is not entirely divested, until the goods have come into the possession of the vendee. He has therefore a complete right, for just cause, *to retract the intended delivery*, and stop the goods in transitu. The cases in our Courts of law have confirmed this doctrine, and the same law obtains in other countries."

In the Roman law—"the tradition was so neccessary that *dominium* could not be acquired by contract merely, To obtain *dominium* there must have been added tradition or delivery. So if a man bought a house and paid the purchase money, and was not put in possession, he had not the least right in the house, but only an action arising out of the obligation. Comm. of Gaius, p. 232.

Domat, in his work on the civil law, treating of the completeness of the contract made perfect by consent of the parties, says: we must distinguish two sorts or two degrees of perfection. The difference consists in this: The bare consent forms only the engagement of the contractors to perform reciprocally what they promise to one another. Thus the seller is bound to deliver the things sold, and the buyer to pay the price; and it is in

this sense that the contract of sale is perfected by the *bare consent.*

But there is still wanting a second accomplishment, which consists in the *execution* of these engagements, and has this effect:—that whereas the contract of sale without delivery does not make the buyer master and possessor, and does not give him the right to enjoy, to use, and to dispose of the thing sold, but only a right to demand the delivery of it. *This delivery of the thing together with the payment of the price consummates the sale*, and makes the buyer full master and possessor of the thing, which was the end of the contract of sale."

1 Domat. Civ. Law, p. 202. Note.

Nor is the right of the vendor affected by the fact that he had received the note or bond of the vendee in payment of the price.

It is said by Gibson, C. J., that "nothing but an extinguishment of the debt is satisfaction between the buyer and seller. A power to check for a deposit in bank would not be payment to suspend the vendor's right. The liability on the original contract is not supplanted by a security given for the price, as is instanced by the buyer giving his own note or bill, which though it operates as an extension of credit, extinguishes not the original contract, *nor are the bills of a third person an absolute satisfaction, unless declared to be so by the terms of the bargain.*"

Bell v. Moss, 5 Whart., 204.

Nor is the vendor's lien lost by an express agreement with the vendee that the vendor will retain the goods for him, either with or without rent.

In the case of Townley v. Crump, 4 Ad. & El., 63, a party having goods in his warehouse, sold them and gave the vendee the following order: "We hold to your order 39 pipes, &c., *rent free* to the 25th November next." In this case there was also proof of a usage that such an order in the hands of the vendee would enable him to obtain credit *as having the possession of the goods.* The goods remained in the warehouse until the purchaser became bankrupt.

Trover was brought by the assee in bankruptcy. After a C. A. V., Lord Tenterden, C. J., held that the lien was not lost. "Cases (said he) have been cited, but none where the question arose between the original vendor and vendee.

In Miles v. Groton, 2 Cr. & M., 511, the goods were sold under an invoice which expressed that they remained with the vendee *at rent.* The vendor also accepted a bill of exchange for the price drawn by the vendor—the bill *he had negotiated.*

While the bill was running the vendee sold a part and gave an order on the vendor for the same. The vendor delivered this part to the sub-vendee and charged him the proportionate rent.

Subsequently the vendee became bankrupt, the bill was dishonored and the assee in bankruptcy brought trover to recover the property.

BAILEY, B.

"It is insisted that the *bill is still outstanding.* That is true, and it may perhaps operate to prevent the seller from having a complete right to the goods so as to be able to give a valid title by reselling to a third party.

But the only question in the present case is whether he had not the right to hold them until the price is paid. But, it is said, that the warehouse rent was charged upon

these goods. I am of the opinion *this fact makes no difference,"*

After distinguishing this from the case of Hurry v. Mangles, 1 Camp., 442, the decision proceeds: "Here the effect is not to make (as has been argued) the warehouse of the vendor the warehouse of the vendée, but to make it a part of the contract that the goods were not to be delivered until not only the price but the rent is paid. Vaughan, B. "It is said that the warehouse rent makes a difference and constitutes a delivery." In Winkes v. Hassals, (9 B. & C., 372, Mr. Justice Littledale said, "the charge of warehouse rent does not, I think, constitute such a delivery, as to give a plaintiff the right to remain an action. Guerney, B., concurred.

Again, though the general rule is that when once the *actual possession* is delivered, the vendor's lien is extinguised. The law so highly favors the equity of this lien that where the possession had actually passed, and the vendor, by a tort, retakes the possession, he is still protected for the unpaid purchase money.

In such a case of tortious retaking, the vendee may bring his action of trespass or trover, but the decisions limit his recovery of damages by the *deduction of the amount of the unpaid purchase money.*

Stephens vs. Wilkinson, 2 B. & Ad., 320.
Page vs. Cowasjee, L. R. 1, P. C. App., 127.

The seizure made in this case, by the direction of the Secretary of the Treasury, under the power supposed to have been conferred by the act of 1863, did not divest the title held by the claimant.

It is true the property was changed in character ; but the proceeds remained in the hands of the Government

as a substitute for the property, and are now held by it in trust for the proper owner.

As already stated, the instructions by which the seizure was made expressly left "all questions of right, title, or value of consideration," to be adjusted by the Court of Claims."

We therefore submit that whatever may be the proper designation of the *right of retention* by the owner when the vendee has become insolvent, whether we term it a *lien*, as is expressed in some of the cases, or whether it is to be described as a "right arising out of his relation to the goods, *qua* vendor, which is greater than a lien," as stated in Kinlock vs. Craig (Supra), it is a right in and to the thing, constituting ownership within the fair meaning and purview of the act of 1863.

The Government could not have maintained an action of trover on the ground that day had been given for payment without having deducted from the damages the unpaid price, in like manner as if an action had been brought on the contract for non-delivery.

Mason vs. Lickbarrow, (*supra.*)

If it could not have gained possession and deprived the claimant of his right to the purchase money, by a lawful suit, the claimant should not lose his purchase-money by an unlawful seizure.

P. PHILLIPS,
for Appellant

In the Supreme Court of the United States.

GAIUS WHITFIELD
vs.
THE UNITED STATES. } No. 198.

APPEAL FROM COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

GAIUS WHITFIELD
vs.
THE UNITED STATES. } No. 198.

APPEAL FROM COURT OF CLAIMS.

Brief for the United States.

Sprott's case (19 Wall., 459) was one in which the cotton whose proceeds were claimed, had been sold by the Confederate States to the claimant, while in the present the claim is for the proceeds of cotton that had been sold by the claimant to the Confederate States.

Both cases are affected with the *vice* attending all dealings *in cotton* with the Confederate States.

The sale by the claimant to the Confederate States, being *upon a credit*, vested the property and the right of possession in the vendee.

It is, however, contended by the claimant that the subsequent *disappearance* of the vendee is equivalent to an *insolvency*, and therefore that upon such insolvency a lien arose in him which gave him authority to detain the cotton, an authority which he can assert against the United States.

This lien is treated by the claimant as if the insolvency

had the effect of rescinding the contract and making him *owner* again.

The rule however is, that insolvency does not *rescind* the contract, but merely gives a right to detain the goods until the price is secured. (Benjamin on Sales, § 897; 2 Kent, 541 and 546, Holmes' note; Ex parte Chalmers, 8 Chancery Appeal, (L. R.,) 289.)

According to that principle the claimant, who has been deprived of the possession of 118 of the 177 bales to which the lien attached, may have (supposing other objections removed) a right to an account by which he shall get *out of the net proceeds of the* 118 *bales so much of the price for which he sold to the Confederate States as has not been obtained from the* 59 *bales which he has kept.*

This concession goes upon the ground that in such case the lien of a vendor is *ownership* within the statute giving jurisdiction to the Court of Claims over the proceeds of captured and abandoned property, (12 Stat., 820, sect. 3,) a point which is hereby submitted without discussion.

However this may be, the cotton in question after the sale and at the termination of the rebellion, was the property of the Confederate States. As such it was then *captured* by the military power of the United States, although it did not until several months thereafter come into their possession, and then only by the hands of a civil officer.

"Complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government; or in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy, nation, or

state. *His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered state, including even debts as well as personal and real property.*" (United States *v.* Huckabee, 16 Wall., p. 434.)

The transaction between the Treasury agent and the claimant, by which the cotton was divided betwixt them, deserves some consideration.

It seems probable that the 59 bales were left with the claimant to satisfy his supposed lien for the money due by the Confederate States; and, considering the high price of cotton just after the surrender, their value would have been an ample satisfaction therefor.

Inasmuch as, since the surrender, the claimant has had no interest in the cotton, beyond the amount of the debt secured by the lien, I submit that the above transaction constituted such a *compromise* of his rights and those of the United States, or such an *accord and satisfaction* as ought not now to be disturbed. (1 Steph. N. P., 390; 1 Story Eq., § 133.)

Is it now competent for the United States to sue the claimant for the 59 bales which he retained because of that agreement? By disclaiming any rights thereunder the claimant admits that he holds them subject to whatever rule this court may establish as to the 118.

The claimant places his right to recover upon two distinct grounds, viz, (1) his sale of the cotton to the Confederate States was a nullity, inasmuch as they were incapable of taking by purchase; and (2) if that be not so, he has at all events a right to the proceeds, because of the interest which reverted to him upon the *insolvency* of the Confederate States.

I. As to the former of these grounds, it seems enough to say that this court has twice held that the Confederate States could purchase *lands*, which seems *a fortiori* to apply to the present question. (United States *v.* Huckabee, 16 Wall., 434; Titus *v.* The United States, 20 Wall., 475.)

Even the language of this court upon this point, cited by the claimant from Sprott's case, implies dissent from what the Court of Claims had said thereupon.

II. As to the right of the claimant in respect of his lien as vendor.

It is admitted by the learned counsel for the claimant that this lien did not arise upon the sale, which was in consideration of *bonds* that were not due; but that it arose (a sort of *springing* use) upon the happening of the insolvency of the vendee. And so are all the authorities.

I may say here that Mason *v.* Lickbarrow, as cited by the claimant, (H. Bl. 357,) was overruled in the House of Lords. See Smith Lead. Cas., 1, 1039, 6th Am. ed.

What is termed the *insolvency* of the vendee is its *disappearance.* Whether this court can predicate *solvency* or *insolvency*, which are *legal* conditions, in respect to such an existence as the Confederate States, may be to inquire too curiously.

It may be asked, before what law was that government solvent or insolvent?

It was as solvent at one point of *its existence* as at another.

Only after its destruction could it be called insolvent, and that insolvency came of the circumstances, that it was destroyed by force, *and* that its destruction was of that peculiar sort that vested all its means in the power by which it was destroyed.

If the destroyer took its means subject to its obligations, then it did not become insolvent, and so no lien arose. If a solvent vendee upon credit die, no lien arises as against his executors.

The alleged insolvency arises from the fact that the United States captured all the means of the Confederate States without becoming liable for its obligations; and this proposition of course annuls the claim before the court.

If the claimant have no debt as against the United States, he can have no lien as against them. A captor does not take subject to incumbrances in favor of other citizens of the hostile government. Much less can it be allowed that *by the capture* such an incumbrance *arose* even though in the antecedent state of things it had no existence; which is the present suggestion.

It is submitted that the United States, by capture, took this cotton in *precisely* the same right in which previously to such capture it was held by the Confederate States, *i. e.*, that it took it with *a right of property, and a right of immediate possession.* The circumstance that the United States at the moment when the Confederate States disappeared captured *all of the means of the latter without liability to account*, so far from initiating in favor of the claimant a specific right which he did not theretofore possess, is of itself the strongest denial of such right.

What was captured here was *the cotton itself*—not a chose in action in respect of such cotton. This distinguishes the present from the cases of Prioleau and McRae, cited for the claimant, (brief, p. 9.) In those cases the goods and means were within the dominion of Great Britain. Therefore, of course, *the things themselves could not be captured;* consequently, what the United

States took by the surrender in regard to those things was a right of suit. As these suits were in equity, it was held that they necessarily involved the taking of an account as between the Confederate States and the defendants in respect of their dealings about such things. These principles do not apply to a case of actual capture.

S. F. PHILLIPS,
Solicitor-General.

Supreme Court of the United States.

GAIUS WHITFIELD,
vs.
THE UNITED STATES. } No. 198.

Brief in reply to the Solicitor General.

Whether, upon the concession that Whitfield could re-retain the cotton for the unpaid purchase money, such right constituted him an owner within the terms of the act of 1863, authorizing a suit in the Court of Claims, is a question which the Solicitor says "is submitted without discussion."

We say, in the first place, that as the claimant was illegally deprived of his possession by the Treasury Agent under instructions of the Secretary, which distinctly declared that such taking would not deprive the possessor from raising in the court all questions of claim thereto, the party is entitled, *ex equo et bono*, to the amount of the proceeds in the hands of the government under the general jurisdiction of the court.

But we insist that the right of recovery can be maintained as well under the act of 1863.

It is true that the act uses the word "owner" and requires proof of his "ownership." It would require a very technical construction of the act to exclude a party who had an undivided interest, or to require an absolute ownership.

Although there can be but one absolute owner, there may be a qualified ownership of the same thing by many. Thus the bailor has the general ownership of the thing bailed, but the bailee the special ownership.

The right of retention on the part of the vendor, as already described in the opening brief, is "a right arising out of his relation to the goods, *qua vendor*, which is greater than a lien."

In a subsequent case, Bloxam vs. Sanders, it is said "the right is not a mere lien but grows out of his original ownership and dominion.

And Blackburn, cited by Benjamin, says: "Assuming what is well established that the vendors' rights exceed a lien, and are greater, that can be attributed to the assent of the purchaser under the contract of sale, the question is how much greater than a lien are they? The better opinion seems to be that in no case do they amount to a complete resumption of the right of property, or in other words, to a right to rescind the contract of sale, but perhaps come nearer to the right of a pawnor with power of sale."

Blackburn on Sales, 325.

Now, in the case of a pawn, while the general property remains in the pawnor, there is a special property in the pawnee.

Among the American cases on this subject, we select Bell vs. Moss, in which Gibson, J. decides that this right which "first was sanctioned by a Court of Equity, has grown by common usage into a legal privilege annexed to the contract of sale, and equally, but much more frequently enforced in a Court of Law."

5 Whart., 204.

The right here set up is one which attaches to the thing and grows out of the contract of sale, and confers

a special ownership which was intended to be protected by the act of 1863, and by the direction of the Secretary who caused the seizure to be made.

The next proposition of the Solicitor General is that however this may be, the cotton was *captured* by the military power of the United States, although it did not come until several months thereafter into their possession, and then only by the hands of a civil officer." p. 2.

This is followed by the position that the "captor does not take subject to incumbrances in favor of other citizens of the hostile government." p. 5.

We deny that this cotton was ever *captured*. A "capture" is the taking of property by one belligerent from another."

In the case of the United States vs. Paddleford, captured property is defined to be such "as has been seized or taken from hostile possession by the military or naval forces of the United States." 9 Wall, 537.

Capture is a belligerent right attached to a state of hostilities, and cannot therefore exist when hostilities have terminated.

To sustain his position the Solicitor General refers to the case of Huckabee vs. United States. 16 Wall, 435.

The facts in that case show that the property was actually captured by the military forces of the United States, and the possession thereof turned over to the government during actual hostilities.

To prove a capture in the case before us reliance is placed on the doctrine announced in the case cited, "that complete conquest carries with it all the rights of the former government, and that these rights are not limited to mere occupation of what has been taken into actual

possession, but extends to all property and rights of the conquered State including even debts as well as personal and real estate."

There is nothing in this citation which justifies the position that the Government holds such property by the right of *capture.*

Reference is made by the Court to Halleck and Vattel; which fully sustain the doctrine as announced.

The former in describing the right, thus to acquire the property of the overthrown Government, says: "the conquerer becomes the *heir* and *universal successor* of the defunct or extinguished State." p. p. 451. § 39.

Vattel says: "money in the hands of a banker of a prince whose territories have been conquered, may be recovered from him by an *information filed by the Attorney General.*

The position assumed by me in the main argument, that the government "can only claim title to this property by virtue of its right to succeed to the property owned by the conquered government," is not at all impugned by the doctrine in Huckabees' case.

Reference to sustain my position, was made to the cases of the United States v. Prioleau, and United States v. McRae.

The Solicitor General, not denying the law as laid down in those cases, to wit, that the United States could only maintain their suit as successor or representative of the defunct government, and therefore subject to all the defenses and rights which could have been asserted against it, says: "In these cases, the goods and means were within the dominion of Great Britain. Therefore, of course, the *things themselves could not be captured.* Consequently, what the United States took in regard to these

things, was a matter of suit" These principles (says he) do not apply to the case of actual capture. p. 5, 6.

If the extinction of the rebellion vested all rights of property in the United States which belonged to the overthrown government in virtue of a title by capture, and the captor does not take subject to incumbrances in favor of citizens of the hostile government, as contended for, then it is of no consequence where the property is situate, whether in this or another country.

The dispute between my learned brother and myself on this branch of the case, is not that the Government of the United States acquired no title to this property, but, it is as to the nature of that title.

He desires to place it on the paramount ground of capture, which is a belligerent right, freeing the captor from all rights attached to the thing captured, while my position is, that the government acquires the property as successor or representative of the overthrown power, as asserted in the English cases.

In answer to the proposition, that as this goverment could only claim in right of the insolvent vendee, and therefore was not entitled to the possession of the property without payment of the price—the Solicitor General states this proposition:

"If the destroyer took its means subject to its obligations, then it *did not become insolvent, and so no lien arose.* If a solvent vendee upon credit die, no lien arises as against his executor."

The first part of this paragraph I do not comprehend, for the obligation of the assignee or representative of the vendee, arises on the very ground of the insolvency of the vendee.

The latter sentence of this paragraph is as to matter outside of this case, but it announces a proposition denied to be law.

Even in cases where insolvency is not alleged, if the credit has expired, and the debt remains unpaid, the property still remaining in the possessions of the vendor, he may retain possession until payment.

Benjamin states it thus:

Where the sale has been made on a credit there is a waiver of the lien. But if the buyer for his convenience has left the goods with the vendor until the credit has expired, and has then made default, or has become insolvent before the credit has expired, does his lien revive on the ground that the waiver was conditioned on the buyers maintaining himself in good credit?

This is the question put at p. 661, Am. Ed., and after a full review of all the authorities is thus answered at p. 675:

"An unpaid vendor, even when he has relinquished his lien by the terms of his contract, where the controversy is between him and the insolvent buyer *or his assignees*, may refuse to give up the possession of the goods without payment of the price."

Again the Solicitor General makes the point, that the agreement to allow the petitioner to retain the one-third of he cotton, was in effect a compromise of his interest.

The agreement was made under treasury regulations, and the finding of the facts shows that the one-third was retained in consideration of putting the remainder in good order.

The Illegality of the Sale.

The claimant is denied a recovery on the ground that the cotton was sold to the Confederate government, whose title on its dissolution passed to the United States.

This necessitates the decision of two questions:

First, Was not the transaction in aid of the rebellion, and therefore void?

Second. Had the Confederate government such a legal existence as enabled it to acquire property by contract?

As to the first, this court has decided in Sprott's case that a *purchase* of cotton from the Confederate government was illegal, and this without regard to the motive of the purchaser.

A *sale* of cotton to that government would seem to be subject to the same rule.

In further illustration of this point, we may refer to the case of Hanauer vs. Woodruff, (15 Wall., 439,) which was ~~a suit~~ sent upon a certificate of division.

This was a suit on a promissory note, the consideration of which was State Bonds, styled "War Bonds"

The note was held to be *illegal and void.*

The attempt to bring this transaction within the doctrine laid down in Thorington v. Smith, was overruled by the Court.

Mr. Justice Miller, in a separate opinion, stated he had reluctantly assented to that doctrine, which he regarded "as unsupported by, and in some degree at variance with the general doctrine of the turpitude of consideration, as affecting the validity of contracts;" and while expressing his opinion, that the case before the court fell within the principles of Thorington v. Smith, said, that he was content that its doctrine should be so limited, modified and explained, "as to make it *inapplicable to any further class of cases* at all probable in the history of the Country."

Again, in Horn v. Lockhart (17 Wall, 580), which presented a question of investment in the Bonds of the

Confederacy, the Court say: "This investment was therefore a direct contribution of the resources of the Confederate Government, and the invalidity of any such transaction ought not to be a *debatable matter* in the Courts of the United States."

Though this investment was authorized by a law of the State, and sanctioned by the Probate Court, it was held that this sanction was an absolute nullity and offered no protection.

It would, therefore, appear by the application of the principles of these repeated adjudications to the case before us, that the contract of sale between Whitfield and the Confederate government was *null and void*, and this being so, Whitfield was the *owner* of this cotton as fully and completely after this attempted sale, as he was before it was made.

As to the second inquiry, it is to be observed that in Sprott's case the first conclusion of law as found by the Court of Claims is very direct and emphatic, to wit:

"The government of the Confederate States was an "unlawful assemblage, without corporate power to take, "hold, or convey a valid title to property, real or personal."

This court, in the opinion of the majority, declined to consider this proposition. But after descibing the character of the *State government*, and the effect which had been given by the court to their legislation and acts, the court proceeds to distinguish between such acts, and those of the *Confederate government.*

They say, "the government of the Confederate States can receive no aid from this course of reasoning. *It had no existence except as a conspiracy to overthrow lawful authority.*"

Again, "when it was overthrown it perished totally.

It left no laws, no statutes, no decrees, *no authority which can give support to any contract.*"

This would seem to be tantamount to the declaration of the Court of Claims.

It cannot be alleged that the party to an illegal contract is estopped from setting up his own turpitude.

The maxim "*in pari delicto, melior est conditio possidentis,*" does not depend upon any technical rule, as to which party is the first to urge it.

In conclusion, we say, that no question of loyalty can have any effect upon the decision of the court.

The various proclamations of the President, culminating with that of 25 December, 1868, gave full amnesty and pardon with restoration of all rights of property, and the effect of such pardons on suits in the Court of Claims is too well settled by the repeated decisions of the court to need comment or citation.

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